United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2138 B

United States Court of Appeals

FOR THE SECOND CIRCUIT

JANET GOTKIN and PAUL GOTKIN, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

-against-

ALAN D. MILLER, individually and as Commissioner of Mental Hygiene of the State of New York, MORTON B. WALLACH, individually and as Director of Brooklyn State Hospital, CHARLES J. RABINER, individually and as Director of Hillside Medical Center, and MARVIN LIPKOWITZ, individually and as Director of Gracie Square Hospital,

Defendants-Appellees.

On Appeal From the United States District Court for the Eastern District of New York

BRIEF FOR APPELLEE MARVIN LIPKOWITZ

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EDWARD J. FLYNN (1913-1953)

December 17, 1974

Mr. A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
Foley Square
New York, N. Y. 10007

Re: Gotkin v. Miller, 74-2138

Dear Mr. Fusaro:

At page 9 of our Brief in the above entitled case, we stated that the appeal in Barrett v. United Hospital, et al., 376 F. Supp. 791 (S.D.N.Y. 1974), was sub judice before this Court, having been argued on November 25, 1974. We have since learned that this Court, by Order dated November 27, 1974, has unanimously affirmed the District Court's Judgment on the Opinion of Judge Bauman. Twenty-five copies of this letter are delivered to you herewith, and we should appreciate your associating one copy with each of the copies of our Brief which were filed in your office on December 4, 1974.

Very truly yours,

GOLDWATER & FLYNN

By: ROBERT CONRAD

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UNITED STATES COURT OF APPEALS

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Docket No. 74-2138

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Plaintiffs-Appellants,

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Defendants-Appellees.

BRIEF FOR APPELLEE MARVIN LIPKOWITZ

Statement of the Issues Presented

1. Was the action of defendant Marvin Lipkowitz, Medical Director of Gracie Square Hospital, a private proprietary psychiatric hospital, in declining to make directly available to that Hospital's former patient, plaintiff Janet Gotkin, performed under color of state law so as to confer on the District Court jurisdiction of the subject matter of this action so far

as it concerns this defendant?

2. Assuming arguendo that Marvin Lipkowitz acted under color of state law, did the District Court correctly grant his motion for summary judgment dismissing the complaint, upon the ground that his action, in declining to make directly available to Janet Gotkin her complete medical record at Gracie Square Hospital to assist her and her husband in writing a book, did not deprive the plaintiffs of any rights secured by the Constitution or the laws of the United States?

Statement of the Case

This is an alleged civil rights action under the provisions of 42 U.S.C., Section 1983, seeking injunctive and declaratory relief against, inter alia, the defendant Marvin Lipkowitz, individually and as Director of Gracie Square Hospital. A-1-9. Plaintiffs assert that they are writing a book on Mrs. Gotkin's experiences as a mental patient, and that they have requested, and have been denied, by Dr. Lipkowitz, direct access to the clinical records of the tenures of plaintiff Janet Gotkin as a patient at Gracie Square Hospital, a private, proprietary psychiatric hospital in New York. Nowhere is it alleged that plaintiff Paul Gotkin was ever a patient in any of the defendant institutions or any other mental hospital. In their complaint, plaintiffs allege that this denial of direct access to Janet Gotkin's clinical records violates their consti-

tutional rights under the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

In the District Court, Dr. Lipkowitz moved for an order, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the complaint upon the ground that the Court lacked jurisdiction of the subject matter of the action. In the alternative, Dr. Lipkowitz moved pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for an order granting summary judgment in his favor, on the ground that there existed no genuine issue of fact to be tried and that he was entitled to judgment as a matter of law. A-39-40. On July 25, 1974, Judge Anthony J. Travia, expressly declining to reach the question raised by Dr. Lipkowitz's motion under Rule 12(b)(1), granted his motion for summary judgment under Rule 56(b). A-96-97.

Statement of the Facts

On several occasions between 1962 and 1970, Janet Gotkin was a voluntary mental patient at Gracie Square Hospital. The precipitating cause of many of these hospitalizations was a series of suicide attempts and threats. A-47, A-74. Plaintiffs have co-authored a book which is to be published by Quadrangle Books, in late 1974 or early 1975, dealing with Janet Gotkin's involvement with psychiatry. Plaintiffs, asserting their need to verify factual information for purposes of the book, such as,

dates of admission, drug dosages, diagnoses, dates of shock treatments and test results, and to compare the Hospital's version of incidents described in the manuscript with Janet Gotkin's recollection and account thereof, requested direct access to the clinical records of her stays in Gracie Square Hospital, as well as the other hospitals where she was a patient. A-3-5. Gracie Square Hospital, pursuant to its policy in such matters, declined to furnish such direct access to Janet Gotkin, but it has asserted, by Dr. Lipkowitz's affidavit, that it would make such records available to a licensed physician designated by Mrs. Gotkin. A-46. This policy of the Hospital was designed to protect the confidentiality of the information contained in the clinical records of patients, since such records often contain technical and scientific expressions not understandable by laymen, of-the-moment ruminations of physicians, the impulsive and other utterances of the patients, as well as those of, or concerning, third parties. A physician, it is reasonably assumed, will bear in mind, in determining what portion of such clinical record may be turned over to the former patient, the need to protect that patient against disturbances by the very materials contained in the record, as well as the need to protect the rights of others which may be involved in such records. A-45-46.

Gracie Square Hospital is a private proprietary hospital devoted principally to psychiatric patients. It is funded

privately and receives no grants or emoluments or awards from the Federal Government, the State of New York or the City of New York, or any agency of such governments. As such a private institution, its policy not to provide direct access to former psychiatric patients of their clinical records in the Hospital, is its own private, professional determination, mandated by no government or government agency.

POINT I

THE DEFENDANT MARVIN LIPKOWITZ, MEDICAL DIRECTOR OF GRACIE SQUARE HOSPITAL, A PURELY PRIVATE INSTITUTION, IN DECLINING TO PROVIDE PLAINTIFF JANET GOTKIN DIRECT ACCESS TO HER CLINICAL RECORD AT THE HOSPITAL, DID NOT ACT UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOM OR USAGE OF THE STATE; HENCE, THERE IS NO JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION SO FAR AS IT CONCERNS DR. LIPKOWITZ.

This action is grounded upon the provisions of 42 U.S.C. Section 1983, which creates a cause of action in favor of any person who has been deprived of any rights secured by the Constitution and laws, and by any other person acting "under color of any statute, ordinance, regulation, custom, or usage, of any state..." It is undisputed upon the record in this case that Gracie Square Hospital, of which the defendant Marvin Lipkowitz is the Medical Director, is a private proprietary institution which is funded privately and receives no grants or emoluments or awards or other financial benefits from any government or agency of government. A-44-45. As such a wholly private institution, its actions cannot be said to be those of the state or performed under color of the state. In such circumstances, there is not here present that requisite "state action" mandated by Section 1983 to provide jurisdiction of the subject matter of this action so far as concerns Gracie Square Hospital and its Medical Director.

The law is well established that private hospitals, even

voluntary hospitals receiving so-called Hill-Burton moneys from the state which originate with the Federal Government, are not subject to actions under 42 U.S.C., Section 1983, in the Federal courts.

The leading case in this Circuit, involving jurisdiction of a civil rights action against a private hospital, is Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020, (S.D.N.Y. 1971). In that case, two physicians who had been members of the Medical Staff of the defendant hospital were denied reappointment to the staff for the year 1970. The action was taken without notice to the plaintiffs or an opportunity to be heard but, in accordance with the by-laws of the hospital. In their complaint seeking declaratory, injunctive and monetary relief, the plaintiffs claimed under the Fourteenth Amendment that they had been denied equal protection of the laws and had been deprived of procedural due process by their discharge without notice or hearing. Judge Metzner stated:

> "A private hospital is subject to the precepts of the Fourteenth Amendment only if its actions are tinged with some measure of state involvement. It is an uncontroverted principle that the action inhibited by the due process clause of the Fourteenth Amendment is only such action as may be said to be that of the states. The Civil Rights Cases, 109 U.S.3, 3 S.Ct. 18, 27 L. Ed. 835 (1883)." (P. 1022)

In the course of his decision dismissing the complaint for lack of subject matter jurisdiction, Judge Metzner reviewed the fact

that federal moneys were received by the hospital through state agencies under the Hill-Burton Act, which was designed to induce the states to assume, as a state function, the burden of supervising the maintenance and construction of hospitals. Judge Metzner also reviewed the fact that under the Hill-Burton program and otherwise, all hospitals in New York State are subject to a variety of state regulations and that,

> "...the State of New York plays a substantial role in supervising the operations of private hospitals within its borders. However, this fact does not get us very far...The mere fact that New York regulates the facilities and standards of care of private hospitals or offers them financial support does not make the acts of these hospitals in discharging physicians the acts of the states." (P. 1023)

In reaching his decision, Judge Metzner distinguished Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964), where Hill-Burton funds were distributed to a private, racially segregated hospital pursuant to a state policy of racial discrimination in hospitals within the State of North Carolina. He also distinguished other cases involving such segregation or discrimination, indicating that such encouragement of the state of an arbitrary denial of facilities to a segment of the pupulation is consistently held to amount to state action.

On an almost identical set of facts, in a case this year in the Southern District of New York, Barrett v. United Hospital, et al., 376 F.Supp. 791 (May 1974), Judge Bauman reached

the same conclusion as Judge Metzner in Mulvihill. At the time of the submission of this brief, Barrett is sub judice before this Court, having been argued on November 25, 1974.

Numerous decisions of the Federal Circuit and District Courts are in accord with the decision of Judge Metzner in Mulvihill and Judge Bauman in Barrett, in holding that the actions of private hospitals which are regulated in many respects by their states and/or which are the recipients of government funds, do not rise to the level of state action so as to provide subject matter jurisdiction for civil rights suits predicated upon such actions of the hospitals where the state regulation or government funding is not significantly involved with the action complained of. See, for example, Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973). The court there, citing Mulvihill, held that the action of a private hospital which was regulated by the State of Wisconsin and received Hill-Burton moneys, in refusing the plaintiff the right to perform elective abortions, was not acting "under color of the state". There, the court found no regulations either permitting or prohibiting such abortions, thus leaving the institution free to make its own private decision.

See, also, Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972); Greco v. Orange Memorial Hospital Corp., 374 F.Supp. 227 (E.D. Texas, 1974); Ozlu v. Lock Haven Hospital, 369 F.Supp. 285 (M.D. Pa. 1974).

Judge Metzner in Mulvihill, Judge Bauman in Barrett, and numerous other courts throughout the country in reaching like determinations on this subject, relied substantially on the significant decision of this Court in Powe v. Miles, 407 F.2d 73 (1968). In that case, Alfred University, over which the State of New York exercises regulatory powers with respect to standards of education, dismissed four students for having refused to obey a dean's order in regard to demonstrating in the University's football field during an R.O.T.C. ceremony. Complaint was made by the students for violation of their rights pursuant to 42 U.S.C., Section 1983. The Circuit Court affirmed the motion of the defendant Alfred University to dismiss the case for want of Federal jurisdiction, upon the ground that that private University, albeit regulated in a number of respects by the State of New York, in suspending the students, did not evidence such "state action" as would entitle the students to civil rights relief in a Federal court. This Court held that the contention that New York's regulation of educational standards rendered the acts of the University, in curtailing protest and disciplining students, the acts of the state,

> "....overlooks the essential point--that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff, but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint." (P. 81)

Consistent with the decision of this Court in Powe v.

Miles, supra, is its subsequent decision in Grafton v. Brooklyn Law School, 478 F.2d 1137 (1973). Judge Friendly, once again speaking for a unanimous court, held, as did District Judge Judd below, that the action complained of did not constitute state action for the purposes of jurisdiction of the subject matter of that civil rights action. There, the plaintiffs, law students, had been dismissed by Brooklyn Law School for scholastic deficiencies. Applications by plaintiffs for re-admission were denied after hearings, following which they instituted this action asserting various Federal Constitutional deprivations. Reviewing Powe v. Miles, supra, and applying it to Grafton, Judge Friendly held that the mere grant of property to assist in the construction of a law school facility and the fact that regulations of the New York Court of Appeals specified the kind of law school for which a graduate degree would qualify an applicant to take the bar examination, did not constitute such a state involvement in the actions of the Brooklyn Law School, a private, non-profit institution, as to constitute state action and, thus, to furnish jurisdiction of a civil rights action under 42 U.S.C., Section 1983. Consequently, this Court affirmed Judge Judd's dismissal of the action for lack of jurisdiction over the subject matter.

A similar result was reached by this Court in Wahba v. New York University, 492 F.2d 96 (1974). There, plaintiff, a biochemist, who had been employed by New York University, brought an action to recover punitive damages for his allegedly

unconstitutional dismissal from the faculty of the N.Y.U. School of Medicine. He had been employed on a research project within the Biochemistry Department funded by a National Institute of Health grant from the United States Department of Health, Education & Welfare. By reason of disputes between the plaintiff and the head of the Biochemistry Department, plaintiff's appointment for 1970 was not renewed. Plaintiff, having found another position, instituted this civil rights action for punitive damages, asserting various infringements of his Constitutional rights. The defendants moved for dismissal of the complaint and, in the alternative, for summary judgment. Judge Knapp treated the motion as one for summary judgment, as did Judge Travia in the instant case. After reviewing the regulations surrounding the Federal grant, Judge Kn noted that there was no requirement that procedural due process be afforded to any participant in the project who might be severed from it. Consequently, Judge Knapp reached the conclusion that the action of New York University did not constitute state action and he therefore granted summary judgment in favor of the defendants.

This Court affirmed unanimously, and Judge Friendly's opinion in the case is a textbook collection of the pertinent authorities on "the pervasive theme of what constitutes government action". (In arriving at the conclusion for this Court in Wahba, that state action was not involved, Judge Friendly distinguished, as did Judge Metzner in Mulvihill, supra, Simkins v.

Moses H. Cone Memorial Hospital, supra, and other discrimination cases where the courts more readily find "state action".) At bottom, said Judge Friendly, the task is always the one suggested by Mr. Justice Clark, in Burton v. Wilmington Parking Authority, 365 U.S. 715, at p. 722, of "sifting facts and weighing circumstances" (492 F.2d, at p. 101) to perceive if state action is significantly present, adding:

> "....[D]etermination of government action in such cases as this hinges on the weighing of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." (492 F.2d, at p. 102).

Gracie Square Hospital is even further removed from government involvement than all of the hospitals and non-hospital institutions in the cases cited above, in that Gracie Square Hospital is not only a private hospital, it is a proprietary hospital which receives no government funding of any kind.

Nor does the fact that Gracie Square Hospital is licensed by the State of New York and is regulated in a number of respects by the State Department of Mental Hygiene constitute such state involvement in the action complained of as to provide jurisdiction over the subject matter of this action as far as Gracie Square Hospital is concerned. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the Supreme Court

held that state liquor licensing and regulating of a private club did not constitute such state action as to provide subject matter jurisdiction of a civil rights action by an individual who had been barred as a guest of the club on account of his race. Said the Court (p. 176):

> "There is no suggestion in this record that Pennsylvania law, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation."

The Court then discussed the Pennsylvania liquor licensing regulations, and said (p. 177):

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

So, here, no statute or regulation expressly or impliedly involves the state in the decision of Gracie Square Hospital whether or not to make directly available to a former patient that patient's clinical record in the Hospital. What is the statutory and regulatory involvement of the state?

In Section 15.13 of the New York Mental Hygiene Law, entitled "Clinical records; confidentiality", it is provided,

as follows, in paragraph (a):

> "(a) A clinical record for each patient shall be maintained at each facility. The record shall contain information on all matters relating to the admission, legal status, care, and treatment of the patient and shall include all pertinent documents relating to the patient. The commissioner, by regulation, shall determine the scope and method of recording information, including data pertaining to admission, legal matters affecting the patient, records and notation of course of care and treatment, therapies, restrictions on patient's rights, periodic examinations, and such other information as he may require."

Nothing there tells the private hospital what it must do if a former patient demands direct access to his or her clinical record. In paragraph (b), the following is provided:

> "b) The Commissioner may require that statistical information about patients be reported to the department. Names of patients treated as outpatient or non-residential facilities and at general hospitals shall not be required as part of any such reports."

Again, no instruction to the private hospital as to patient access to records. Finally, in paragraph (c), it is provided:

> "(c) Such information about patients reported to the department, including the identification of patients, and clinical records at department facilities shall not be a public record and shall not be released by the department or its facilities to any person or agency outside of the department except as follows:
>
> 1. pursuant to an order of a court of record.
>
> 2. to the mental health information service.
>
> 3. to attorneys representing patients in proceedings in which the plaintiffs involuntary hospitalization is at issue.

4. with the consent of the commissioner and the consent of the patient or of someone authorized to act on the patient's behalf, to:

(i) physicians and providers of health, mental health, and social or welfare services involved in caring for, treating, or rehabilitating the patient, such information to be kept confidential and used solely for the benefit of the patient.

(ii) other persons who have obtained such consent.

5. with the consent of the commissioner, to:

(i) agencies requiring information necessary to make payments to or on behalf of patients pursuant to contract or in accordance with law, such information to be kept confidential and limited to the information required.

(ii) persons and agencies needing information to locate missing persons or to governmental agencies in connection with criminal investigations, such information to be limited to identifying data concerning hospitalization.

(iii) the firearms control board of the city of New York, when such board has requested information with regard to a named person, providing such request is accompanied by a certification from such board that the named person has applied to it for a permit or license pursuant to sections 436-6.3 and 436-6.6 of the administrative code of the city of New York."
(Emphasis supplied.)

Here, there is concern with the confidential treatment of clinical records, but only with "clinical records at department facilities", that is, the Department of Mental Hygiene's own

hospitals. It is true that the policy of Gracie Square Hospital, in authorizing delivery of patient records to physicians designated by the patients, is similar to at least a portion of the policy expressed in paragraph (c) of Section 15.13. But that paragraph of the statute speaks neither one way nor the other with respect to the records of private psychiatric institutions, leaving the private hospital free, we submit, to formulate its own policy in this area. Finally, paragraph (d) of Section 15.13 provides:

> "(d) Nothing in this section shall prevent the exchange of information concerning patients, including identification, between (i) facilities providing services for such patients pursuant to an approved unified services plan, as defined in article eleven, or pursuant to agreement with the department and (ii) the department or any of its facilities. Information so exchanged shall be kept confidential and any limitations on the release of such information imposed on the party giving the information shall apply to the party receiving the information."

Here, again, is legislative silence on the matter of direct patient access to records in private hospitals.

Nor do the regulations adopted by the Commissioner of Mental Hygiene contain any such direction or prohibition to the private hospital as to the matter of making directly available to former patients their clinical records in the private facil-

ity. In Title 14 of the New York Official Compilation of Codes, dealing with Mental Health, Section 82.8, entitled "Records and Statistics", contains the only references to patient records. In paragraph (a), it is provided that there shall be an individual record for each person admitted to a hospital for the mentally ill and that each case record shall include some thirteen different items of information. In paragraph (b) of Section 82.8, it is provided: "Patient records shall be safeguarded for confidentiality and be accessible only to authorized persons." However, the regulation does not purport to define for the private psychiatric hospital, who are "authorized persons", or to instruct the private hospital whether or not former patients of the hospital are such "authorized persons".

Clearly, then, the answer to the question of whether former patients of a private mental hospital may have direct access to their clinical records in that hospital, has been left by the legislature entirely up to the private hospital. As Judge Stevens said, in Doe v. Belli Memorial Hospital, supra:

> "There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves." (479 F.2d, at pp. 759-760).

The state having authorized private hospitals to answer for themselves the question whether former patients may have direct access to their records, Gracie Square Hospital has answered that question by its policy of denying to former patients such direct access and of making such records available to a physician designated by the former patient.

Nor has this freedom of decision-making by private hospitals been disturbed by the adoption of Section 17 of the New York Public Health Law, entitled "Release of medical records", which became effective July 1, 1974, after this case was sub judice before Judge Travia. That statute reads, as follows:

> § 17. Release of medical records
>
> Upon the written request of any competent patient, parent or guardian of an infant, or committee for an incompetent, an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records regarding that patient to any other designated physician or hospital, provided, however, that such records concerning the treatment of an infant patient for venereal disease or the performance of an abortion operation upon such infant patient shall not be released or in any manner be made available to the parent or guardian of such infant. Either the physician or hospital incurring the expense of providing copies of x-rays, medical records and test records pursuant to the provisions of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expenses."

What is provided in the foregoing statute is that certain specified portions of a patient's hospital record must be turned

over to a physician designated by that patient. Quite apart from the fact that the legislative policy expressed in Section 17 is consistent with the policy adhered to by Gracie Square Hospital as to the availability to patient-designated physicians of patient records, here, again, the legislature is silent as to whether the private hospital must afford to the former patient direct access to any part of his clinical record. Even under this new statute, which was not effective at the time of the institution of this action, Gracie Square Hospital remains free to adopt its own policy with respect to direct patient access to patient records.

From the undisputed facts in this case and the many authorities pertinent to these facts, it is quite plain that Gracie Square Hospital, in determining not to furnish to appellant Janet Gotkin her clinical record at Gracie Square Hospital, was not the State of New York in making such determination, nor was it acting under color of any state law in making such determination. Rather, as a private, proprietary institution, it was making a private, professional decision, neither mandated nor prohibited by state law, ordinance, regulation, custom or usage. In the circumstances, the complaint in this action should have been dismissed as against the defendant Marvin Lipkowitz, Medical Director of Gracie Square Hospital, upon the ground that the Court lacks jurisdiction of the subject matter of the action.

POINT II

EVEN IF THE ACTION OF GRACIE SQUARE HOSPITAL, IN DECLINING TO MAKE AVAILABLE DIRECTLY TO ITS FORMER PATIENT HER CLINICAL RECORDS, IS HELD TO CONSTITUTE STATE ACTION, FROM THE UNDISPUTED FACTS IN THIS CASE, SUCH ACTION, AS A MATTER OF LAW, HAS INFRINGED ON NO CONSTITUTIONAL RIGHT OF THE PLAINTIFFS.

Defendant Marvin Lipkowitz, for his authorities in support of this Point, relies on, and respectfully incorporates herein, Points I and II of the Brief of the State defendants, Point I of the Brief of the defendant Charles J. Rabiner (Long Island Jewish-Hillside Medical Center), and Points I and III of the Brief of Hospital Association of New York State, amicus curiae.

CONCLUSION

There is no jurisdiction over the subject matter of this action so far as concerns the defendant Marvin Lipkowitz, individually and as Director of Gracie Square Hospital. If this Court holds that there is such jurisdiction over the subject matter of this action, the decision and order of Judge Travia granting summary judgment should be affirmed in all respects.

Respectfully submitted,

GOLDWATER & FLYNN
Attorneys for Appellee MARVIN LIPKOWITZ, individually and as Director of Gracie Square Hospital

GEORGE KOSSOY
ROBERT CONRAD
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JANET GOTKIN and PAUL GOTKIN, individually etc.,

Plaintiffs-Appellants,

-against-

ALAN D. MILLER, individually etc., et al.,

Defendants-Appellees.

- x

Docket No. 74-2138

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK, SS.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 433 Lincoln Avenue, Cliffside Park, N.J.

That on the 3rd day of December, 1974, deponent served the annexed BRIEF FOR APPELLEE MARVIN LIPKOWITZ on the following attorneys, at their respective addresses designated by them for that purpose:

CHRISTOPHER A. HANSEN, ESQ.
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PROSKAUER ROSE GOETZ & MENDELSOHN, ESQS.
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300 Park Avenue
New York, N. Y. 10022

by depositing two true copies of same enclosed in a postpaid properly addressed wrapper to each of the above named attorneys, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

SWORN to before me this
3rd day of December, 1974.

Robert Conrad

ROBERT CONRAD
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-0730255
Qualified in New York County
Term Expires March 30, 1975

Anna S. Kolakowski

ANNA S. KOLAKOWSKI